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September 26, 2007

**VIA FACSIMILE AND REGULAR MAIL**

Chairman Ross Johnson  
Commissioners Timothy A. Hodson, A. Eugene Huguenin,  
Robert Leidigh and Ray Remy  
Fair Political Practices Commission  
428 "J" Street, Suite 800  
Sacramento, CA 95814

Re: *Proposed Amendments to Regulation 18540.4*

Dear Chairman Johnson and Commissioners Hodson,  
Huguenin, Leidigh and Remy:

We write to propose a minor modification to the Fair Political Practices Commission's proposed amendments to Regulation 18540.4 relating to legal defense funds. Government Code section 85304, which was enacted as part of Proposition 34, permits state candidates and officeholders to establish a legal defense fund "if the candidate or officer is subject to one or more civil or criminal proceedings or administrative proceedings arising directly out of the conduct of an election campaign, the electoral process, or the performance of an officer's governmental activities and duties." (Gov. Code, § 85304, emphasis added.) Section 85304 is not limited to a situation where the officeholder is the subject of a civil, criminal, or administrative proceeding, i.e., the target. Rather, it encompasses a situation where the officeholder is subject to a civil, criminal, or administrative proceeding, as would be the case, for example, if a subpoena were served on a candidate or officer to testify in such a proceeding.

Under the statute, therefore, an officeholder should be able to establish a legal defense fund to pay legal fees he or she incurs as a result of being called to testify or submit to an interview in a civil, criminal or administrative proceeding, as long as the testimony arises directly out of the conduct of an election campaign, the electoral process, or the performance of an officer's governmental activities and duties. The proposed amendment to Regulation 18540.4, however, appears to allow a legal defense fund only when a candidate or officeholder is the *target* of the civil, criminal or administrative proceeding.

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The proposed amendment thus fails to recognize the very real possibility that a candidate or officeholder could find him or herself swept up into an investigation in which the candidate or officeholder is not the target. Indeed, the *San Francisco Chronicle* recently reported that 13 members of Congress have been subpoenaed to testify in a congressional corruption case.<sup>1</sup> Given the risk of prosecution for perjury in such matters, it would be irresponsible for an elected official not to seek the advice of counsel when he or she is asked to submit to an interview by law enforcement authorities or is called to testify in a court or grand jury proceeding.

We therefore propose that the Commission modify its proposed amendment, as follows, to conform to Government Code section 85304 and to permit a candidate or officeholder to use a legal defense fund to defray his or her expenses under these circumstances:

A candidate or officer may only raise funds under this regulation for defense against a civil or criminal proceeding, ~~or for~~ defense against a government agency's administrative enforcement proceeding, or for legal counsel in connection with a civil, criminal or administrative subpoena or request for an interview made by law enforcement authorities arising directly out of the conduct of an election campaign, the electoral process, or the performance of the officer's governmental activities and duties.

(Prop. Reg. 18530.4(g)(2).)

For the Commission's convenience, attached to this letter is a full copy of proposed regulation 18530.4(g)(2) with our suggested modifications indicated in double strike-out text and bold.

Thank you for your consideration of this matter.

Sincerely,



James C. Harrison

JCH:KES  
Attachment  
(00041735-4)

cc: Scott Hallabrin, General Counsel  
John Wallace, Assistant General Counsel  
Emelyn Rodriguez, Commission Counsel

<sup>1</sup> See <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/09/19/MN84S8Q87.DTL&hw=cunningham&sn=002&sc=519>



Deletions = double strike-out

Additions = bold

**§ 18530.4 Legal Defense Funds.**

(a) Application and Definitions.

(1) This regulation applies to the bank account permitted by Government Code Section 85304(a).

(2) For purposes of this regulation, the following definitions apply:

(A) "Legal Defense Funds" means money in the legal defense account.

(B) "Legal Defense Account" means the bank account established at a financial institution located in the State of California pursuant to Government Code Section 85304(a).

(C) "Legal Defense Committee" means a committee formed pursuant to subdivision (b) of this regulation.

(D) "Candidate" means a candidate for elective state office who raises legal defense funds.

(E) "Officer" means an elected state officer who raises legal defense funds.

(a) (b) Establishing the Legal Defense Account and Controlled Committee.

Notwithstanding Government Code section 85201, A candidates candidate or officer who raises legal defense funds pursuant to under Government Code section Section 85304 must shall deposit these the funds in and expend the funds from a single bank account at a financial institution located in the State of California which is separate from any other bank account held by the official, including any a campaign bank account. The candidate or officer must shall establish a controlled committee for the legal defense account by filing a statement of organization pursuant to Government Code section Section 84101. The statement of organization shall contain a description of the specific legal dispute or disputes for which the account is established, and shall be amended pursuant to Government Code Section 84103, as legal disputes are either resolved or initiated. The words "Legal Defense Fund" and the candidate's or officer's last name shall be included as part of in the committee name.

(c) Required Recordkeeping and Audits. The candidate or officer, and the treasurer of the legal defense committee, is subject to recordkeeping requirements specified in Government Code Section 84104 and shall keep separate detailed accounts, records, bills, and receipts, for each legal dispute including documentation to support the basis and timing, as set forth in subdivision (g)(3), for raising legal defense funds. The legal defense committee shall be subject to audits under Chapter 10 of Title 9 of the Government Code. An audit under Government Code Section 90001 of a candidate or officer, or any controlled committee of the candidate or officer, shall include that candidate's or officer's legal defense committee maintained during the audit period as described in Government Code Section 90002(c).

(b) (d) Reporting Requirements. ~~Contributions~~ A contribution to and payment by the legal defense committee ~~and payments by the committee are~~ is subject to the campaign disclosure provisions of Chapters 4 and 4.6 of Title 9 of the Government Code, except as follows:

(1) A contribution or payment is not subject to the provisions of Government Code Sections 84200 through 84204.5.

(2) The legal defense committee shall file quarterly campaign statements as follows: and reports pursuant to Chapters 4 and 5, except Sections 85200 and 85201, of Title 9 of the Government Code at the same times and in the same places as it otherwise would be required to do for any other controlled committee formed by the candidate or officer for election to state office.

(1) No later than April 30 for the period of January 1 through March 31.

(2) No later than July 31 for the period of April 1 through June 30.

(3) No later than October 31 for the period of July 1 through September.

(4) No later than January 31 for the period of October 1 through December 31.

(e) (e) Contributions and Expenditures Not Subject to Certain Provisions.

~~Contributions~~ A contribution to and ~~expenditures~~ an expenditure from a legal defense fund account ~~are~~ is not subject to the provisions of Government Code sections Sections 85200, or



85201, and ~~85402~~ or Article 4 (commencing with Section 85400) of Chapter 5 of Title 9 of the Government Code.

(d) ~~(f)~~ Status as Local candidate or Local Elected Officer. ~~An elected state officer or A candidate for elective state office or officer~~ may establish a legal defense fund account under Government Code ~~section~~ Section 85304 regardless of the individual's status as a local candidate or ~~officeholder~~ local elected officer.

(e) ~~(g)~~ Limitations. ~~Funds raised pursuant to Government Code section 85304 are limited to that amount reasonably necessary to defray the attorney fees and other legal costs related to the proceeding for which the fund was created.~~ For the purposes of Government Code Section 85304(a) the following limitations apply:

(1) Legal defense funds may only be raised in an amount reasonably calculated to pay, and may only be expended for, attorney's fees and other related legal costs.

(A) "Attorney's fees and other related legal costs" includes only the following:

(i) Attorney's fees and other direct legal costs related to the defense of the candidate or officer.

(ii) Administrative costs directly related to compliance with the requirements of subdivisions (b) and (d) and the recordkeeping requirements of subdivision (c) of this regulation.

(B) "Attorney's fees and other related costs" does not include expenses for fundraising, or a payment or reimbursement for a fine, penalty, judgment or settlement, or a payment to return or disgorge contributions made to any other committee controlled by the candidate or officer.

(2) A candidate or officer may only raise funds under this regulation for defense against a civil or criminal proceeding, or for defense against a government agency's administrative enforcement proceeding, or for legal counsel in connection with a civil, criminal, or administrative subpoena or request for an interview made by law enforcement authorities arising directly out of the conduct of an election campaign, the electoral process, or the performance of the officer's governmental activities and duties. An administrative enforcement

proceeding includes a discretionary audit initiated under Government Code Section 90003, but not an audit initiated under Government Code Section 90001 until the candidate or officer reasonably concludes that a government agency has commenced an investigation based upon the audit. A candidate or officer may raise funds under this regulation and Government Code Section 85304 to defend against an election contest conducted pursuant to Division 15 (commencing with Section 16000) of the Elections Code, but may not raise or spend legal defense funds for attorney's fees and other legal costs incurred in an election recount conducted pursuant to Chapter 9 (commencing with Section 15600) of Division 15 of the Elections Code.

(3) Legal defense funds may not be raised in connection with a proceeding until the following has occurred:

(A) In a proceeding brought by a government agency, when the candidate or officer reasonably concludes the agency has commenced an investigation or the agency formally commences the proceeding, whichever is earlier.

(B) In a civil proceeding brought by a private person, after the person files the civil action.

(f) (h) Remaining Funds. Funds remaining in the legal defense account following payment of all attorney's fees and other related legal costs for which the account and committee are established shall be returned to disposed of as follows:

(1) If the total amount of remaining legal defense funds is more than \$5,000, the entire sum shall be returned to legal defense account donors on a pro rata basis.

(2) Remaining legal defense funds, as defined by subdivision (c) of Government Code section 85304, that are not required to be returned under subdivision (b)(1) may shall be disposed of for any of the purpose purposes set forth in subdivisions (b)(1) through (b)(5) of Government Code section Section 89519. Remaining legal defense funds may not be transferred, except as permitted under subdivisions (b)(1) through (b)(5) of Government Code 89519, and except that such disposition is subject to the provisions of Government Code sections Sections 85301-85306 85301 through 85306 and 2 Cal. Code Regs. section Section 18536.



(i) Termination and Reopening of Committees. A legal defense account and legal defense committee shall be terminated, and all attorney's fees and other related costs as well as any remaining funds as described in subdivision (h) returned or disposed of, within 90 days of the date the last legal dispute for which the account and committee are established has been resolved. The Executive Director may for good cause, and consistent with the purposes of Government Code Section 85304 and this regulation, extend the termination date or permit the candidate or officer to reopen the account. The application to extend the termination date or to reopen the account shall be in writing and shall include copies of all supporting documents including copies of billing statements.

(00041544-3)